2011 WL 9369867 (Mich.App.) (Appellate Brief)
Court of Appeals of Michigan.

Simonne VANDEKERCKHOVE, Appellant,
v.
Richard R. SCARFONE, Appellee.

No. 303130.
September 15, 2011.

Wayne County Circuit Court Court Case No.: 2010-014830-NM
Oral Argument Requested

Appellee's Brief On Appeal

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***viii COUNTER-STATEMENT OF QUESTION PRESENTED**

I. Whether the trial court correctly decided that two fee agreements, containing valid arbitration provisions, which were read, signed and initialed on every page by Appellant, are binding and preclude Appellant from bringing an action against Appellee in Circuit Court?

Trial Court Answered: Yes

Appellee Answers: Yes

Appellant Would Answer: No

***ix STANDARD OF REVIEW**

"When considering a motion brought under MCR 2.116(C)(7), we consider all the affidavits, pleadings, and other documentary evidence filed or submitted by the parties. We must consider all well-pleaded allegations as true and construe them most favorably to the plaintiff." *Patterson v Klieman,* 447 Mich 429, 422-34; 526 NW2d 879 (1994), citing *Haywood v Fowler,* 190 Mich App 253, 255-56; 475 NW2d 458 (1991) (internal citations omitted).

Appellate courts review decisions on motions for summary disposition de novo. *Kuznar v Raksha Corp,* 481 Mich. 169, 175; 750 NW2d 121 (2008). "Doubts should be resolved in favor of arbitration. The burden is on the party seeking to show nonarbitrability." *Chippewa Valley Schools v Hill,* 62 Mich App 116, 120; 233 NW2d 208 (1975).

***1 STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

Appellant is an **elderly** woman who lives down the street from Appellee's law office, who used Appellee's services in connection with several legal matters. Appellant was always alert and able to participate in her case, and became friends with the Appellee and his assistant. She frequented Appellee's office and was always kept up to date on her case.

Appellant engaged Appellee to represent her in May of 2007. Appellant signed two fee agreements (the "fee agreements") in connection with, and during the course of the legal representation. Both agreements (May 24, 2007 and April 24, 2008) contained express arbitration provisions. Exhibits 1 and 2. Appellee explained all the provisions of each agreement to Appellant, and Appellant discussed the contents of the agreements with her son. In fact, Appellant's son was actually present with her in Appellee's office when she signed the April 24, 2008 fee agreement.

The legal matters were resolved with the entry of a Consent Judgment at the end of December 2008. The proposed provisions of the Consent Judgment were explained in detail to Appellant, and Appellant acknowledged and authorized the same prior to entry of the Consent Judgment, on November 26, 2008, in a summary memo outlining the settlement. Her signed authorization also acknowledged that she consulted with her son and a lawyer friend regarding the case and the proposed settlement prior to executing the Consent Judgment.

Over two years later, Appellant hired Attorney C. William Garratt, and on December 21, 2010, Appellant filed a lawsuit in the Wayne County Circuit Court, alleging that Appellee was in breach of a legal services agreement between the parties. On February 3, 2011, Appellee filed a motion for summary disposition. Exhibit 3, Defendant's Motion for Summary Disposition; Exhibit 4, Plaintiff's Response to Defendant's Motion for Summary Disposition; Exhibit 5, ***2** Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition. Appellant filed a motion for partial summary disposition, arguing that because her action was filed against Richard R. Scarfone, and not against Richard R. Scarfone, PC, she is not bound to arbitrate the same. Exhibit 6, Plaintiff's Motion for Partial Summary Disposition; Exhibit 7, Defendant's Response to Plaintiffs Motion for Summary Disposition; Exhibit 8, Plaintiff's Reply to Defendant's Response to Plaintiffs Motion for Summary Disposition.

The trial court denied Plaintiff's Motion for Partial Summary Disposition and granted Defendant's Motion for Summary Disposition. Exhibit 9, Order Granting Defendant's Motion for Summary Disposition. In granting Appellee's motion and denying Appellant's motion, the trial court stated that:

She initialed every single page which tells me that everything on that page was explained to her. I don't think that the agreement is hard to understand at all. I think it's clear. I don't see any evidence of fraud in the inducement. I don't see any evidence of unconscionability.

She was clearly hiring the firm and the employees of the firm, and I think she's bound by the arbitration clause. So I will order that you go to arbitration.

I've read this carefully, and I read the cases. And this case clearly needs to go to arbitration.

Exhibit 10, Transcript from Summary Disposition Hearing, pp 11-12.

On March 18, 2011, Appellant filed a claim of Appeal to the Michigan Court of Appeals. Despite having filed this appeal claiming that the case should not be arbitrated, on March 24, 2011, Appellant filed a Demand for Arbitration with the American Arbitration Association involving the same issues as those involved in the original lawsuit, which is now on appeal. Exhibit 11, Demand for Arbitration.

On July 20, 2011, at the request of the Appellee, the American Arbitration Association Arbitrator conducted a telephone conference with counsel to determine whether the arbitration ***3** proceeding should be stayed pending the outcome of the appeal filed with the Michigan Court of Appeals. Exhibit 12, Appellee's letters to AAA Arbitrator (briefly summarizing his position on why a stay of arbitration was appropriate, May 24, 2011, April 4, 2011, April 22, 2011, June 22, 2011 and June 24, 2011). Appellee's position was basically that Appellant should either dismiss the appeal and arbitrate the case or wait for the Appeals' Court decision prior to arbitrating or proceeding in Circuit Court depending on the decision.

After having reviewed the written arguments presented by both parties and after listening to oral argument from both parties and in accordance with Rules 28 and 30 of the AAA Commercial Rules, the Arbitrator agreed with Appellee, and on July 19, 2011, ordered that "[t][his matter will be stayed pending the outcome of the appeal taken with the Michigan Court of Appeals." Exhibit 13, Order Staying Arbitration Proceedings.

On appeal, Appellant contends that the trial court erred in holding that the arbitration provisions within the fee agreements precluded Appellant from asserting her claims against Appellant in Circuit Court. *See* Appellant's Brief.

SUMMARY OF THE ARGUMENT

Appellant apparently argues that the arbitration provisions contained in the two fee agreements, which were read, signed and initialed on every page by Appellant, are invalid and/or unenforceable. Appellant's main argument is that Richard R. Scarfone, the individual, was not a signatory to the fee agreements (despite the fact that he signed the same and was the attorney hired thereunder), and that because she chose to assert her claims against Richard R. Scarfone individually, and not Richard R. Scarfone, PC, the arbitration provisions to not apply to these claims.

***4** However, it is clear from the relevant case law - even that relied upon by Appellant - and the plain language of the arbitration provisions, that those provisions encompass any claims "arising out of or relating to" the legal services provided. Thus, by their own terms, the arbitration provisions apply to the claims asserted in this case. Appellant cannot circumvent the provisions of these valid and enforceable arbitration agreements simply by suing the individual attorney instead of the firm.

Appellant also raises several other arguments for their invalidity, including that she did not read or understand the agreements, and that the agreements were unconscionable or procured by fraud in the inducement. However, Appellant only makes the conclusory statement that the fee agreements are unconscionable or procured by fraud in the inducement, without demonstrating how.

In addition, Appellant attempts to avoid the arbitration provisions by arguing that she did not read or understand the agreements, despite the fact that she initialed every page, signed the agreements, and consulted her son regarding the same. Moreover, Appellee suggested to Appellant that she seek independent counsel regarding the agreements. Appellant may not now avoid the arbitration provisions simply by claiming that she did not read or understand them.

For these reasons, Appellee respectfully requests that this Court affirm the trial courts order granting summary disposition in favor of Appellee.

***5 ARGUMENT**

I. The Trial Court Correctly Decided that the Arbitration Provisions Signed by Appellant Were Enforceable and Precluded Appellant from Asserting an Action Against Appellee in Circuit Court.

Both of the fee agreements at issue in this case, dated May 24, 2007 and April 24, 2008, contain the same following arbitration provision:
"Arbitration. Any controversy, dispute, or claim arising out [sic] of or [sic] relating to our fees, charges, performance of legal services, obligations reflected in this letter or the "Standard Terms of Engagement", or other aspects of our representation shall be resolved through binding arbitration in Michigan in accordance with the rules of the American Arbitration Association, and judgment on the award rendered may be entered in any court having jurisdiction thereof. You acknowledge that by agreeing to arbitration, you are relinquishing your right to bring an action in court and to a jury trial. We recommend that prior to agreeing to this provision you review the various business and legal aspects of such a decision with independent counsel."

Exhibit 1 p. 4, Exhibit 2, p. 5.

Both fee agreements were signed by Appellant and initialed on every page. Additionally, Appellant was advised to seek independent legal counsel regarding the fee agreements, and in fact consulted her son.

A. The Trial Court Did Not Err in Refusing to Find that Appellant Did Not Read or Understand the Agreements

Despite signing the agreements and initialing every page, Appellant argues that she did not understand the fee agreements, and that Appellee did not explain all of their contents. In *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000), the Appellant made a similar argument, that "because defendants failed to advise him that the fee agreement contained an arbitration clause, it is invalid." Watts, 242 Mich App at 604. This Court rejected that argument, stating that "Michigan law presumes that one who signs a written agreement knows the nature of ***6** the instrument so executed and understands its contents" *Id*, citing *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987).

Appellant also argues that this presumption was rebutted by the mere fact that Appellee was Appellant's attorney at the time the second agreement was entered into. [1] However, it was only because of the attorney client relationship that this fee agreement was necessary. If Appellant's argument were accepted, the presumption that one who signs a document knows its nature and contents would simply not apply to fee agreements between attorney and client. However, as illustrated in *Watts, supra*, this is simply not the case. Moreover, Appellee advised Appellant to seek independent legal counsel with regard to the fee agreements, and Appellant did in fact consult with her son.

Appellee cites *Creller v Baer*, 354 Mich 408, 412; 93 NW2d 259 (1958) for the proposition that fee agreements drafted by an attorney, which include arbitration provisions, should be looked at with skepticism. Creller simply does not stand for such a proposition. *Creller cites to Abrey v. Duffield*, 149 Mich 248, 112 NW 936 (1907), for the proposition that "[a]n instrument drafted by an attorney to them, equity will not stand by with suspicion." *Creller*, 354 Mich at 412, citing *Abrey*, 149 Mich at 259 (internal quotation marks omitted). Both *Creller* and Abrey involved instruments transferring property to the attorney that drafted the instrument. In *Creller* it was a deed, and in Abrey it was a will. Neither case involved an agreement between attorney and client to arbitrate disputes between them. Instead, both cases involved "dispositions of property" and Appellant apparently recognizes this, stating: "where as here, an **elderly** person without, *inter alia*, independent advise or counsel ***divests herself of property*** in favor of one in a confidential relationship, equity will not allow the transaction to be upheld." Appellant's Brief at 15 (emphasis added). Nonetheless, Appellant makes an unexplained legal and logical jump, ***7** applying this proposition to the case at bar, which involves, not a disposition of property, but an agreement to arbitrate disputes.

In any event, even viewed with skepticism, the deed in *Creller* was upheld. *Creller* involved a deed of real property owned by an **elderly** and allegedly infirm couple, drafted by their attorney, gifting such property to their attorney. *See id.* In Creller, the appellants proceeded under the theory that the deed was not validly delivered to the defendant attorney, and urged the court that the defendant must have acquired the deed by stealing the metal box containing the deed, or ransacking the **elderly** couple's house. *Id.* at 411. The facts in *Creller* went far beyond Appellant's contention in this case, that because she is an **elderly** immigrant -although she reads, writes and speaks fluent English - her signature and initials do bind her to an otherwise valid agreement. In *Creller:*

Appellant testified that he had never discussed deeding the property to defendants either with them or his wife; that he had no recollection of signing the deed; that defendant John Baer was always 'sticking stuff in front of him to sign; that although the signatures on the deed were those of himself and his wife, he had not known that he was signing a deed and that he would not have signed it if he had known what it was and what it provided; that he had no knowledge of the whereabouts of the deed during the week apparently intervening between the dates when it was drawn and signed; that he and his wife had consulted no other attorney or person in this connection about giving defendants a deed; that all the valuable papers of Appellant and wife were always kept by them in a metal box on a closet shelf; that a few days before the death of Appellant's wife, when she was unable to know what was occurring and while she was being carried out of her home to be taken to a hospital, defendant John Baer took the metal box, telling Appellant that he needed its contents to help him in making out Appellant's income tax return; that after his wife's death defendants ransacked Appellant's home from attic to basement, looking into drawers, etc., and taking many things; that he, the Appellant, never delivered the deed to defendants and had no knowledge of his wife ever having done so; that immediately upon her death defendant John Baer persuaded Appellant to change his $7,000 bank account so as to make him joint owner with Appellant and also to change beneficiaries of his life insurance policies, making them payable to his estate. At about the time defendant John Baer drafted the deed he also drew a joint will, by the terms of which Azalea Baer was to become the chief beneficiary of the estates of Appellant and wife. Appellant testified that, although the will bore his and his ***8** wife's signatures, he could not remember signing it, that he did not know he had made a will of such purport, and that he certainly had no such intention; that upon the death of Appellant's wife defendant took money from Appellant's home and his wife's purse and paid bills and generally took over control of the affairs of Appellant and wife, without Appellant's consent, at a time when he was too grief stricken to make effective protest.

Creller, 354 Mich at 410-11.

Even with the appellant's testimony regarding the egregious facts in *Creller* and viewing the transaction with skepticism, the trial court upheld the validity of the deed and the Michigan Supreme Court affirmed, finding that the presumption of delivery was not rebutted. *Id.* at 12.

Clearly, *Creller* is not applicable to the case at bar. The need to review agreements with "skepticism" arises when an instrument ***transfers property*** to the drafting attorney. This is quite simply not the circumstance in this case. Also, the issue on appeal in Creller was the presumption of delivery of a deed, not the presumption that one has read and understood documents that she signs. Finally, even under "skepticism", and under the seemingly egregious facts of *Creller*, the presumption was not rebutted.

Thus, even if this Court thought it fit to apply the inapplicable dicta from Creller regarding "skepticism," when viewed with skepticism, the facts of this case clearly do not warrant a finding that the presumption that Appellant read and understood the agreement was rebutted. Every page of each of the fee agreements was initialed by Appellant, she read the agreements, consulted with others about the agreements, and Appellee explained the agreements to her. The mere facts that Appellee was her attorney and that she was **elderly** do not rebut the presumption that she read and understood the agreements.

***9 B. The Trial Court did Not Err in Refusing to Find that the Fee Agreements Were Unconscionable**

Appellant argues that the trial court erred in refusing to find the fee agreements unconscionable. Appellant correctly states that in order for an agreement to be unenforceable on grounds of unconscionability, the agreement must be both procedurally and substantively unconscionable. Appellant's Brief at 17.

However, Appellant apparently addresses procedural unconscionability with one sentence: "Here, there is no question that Appellant was the weaker party." Appellant's Brief at 17. First, Appellant does not explain in what respect she was the weaker party. Appellant's age alone does not make any agreement that she enters into procedurally unconscionable. Certainly, Appellant could have refused to hire Appellee and engaged another attorney. As the client, Appellant was arguably in the more powerful position with respect to who she would hire as her attorney. Certainly, it may be true that Appellee had more knowledge about the nature of these transactions, but it cannot seriously be argued that Appellant had "no realistic alternative to acceptance of the contact or term", which Appellant herself acknowledges that procedural unconscionability requires. *See* Appellant's Brief at 17, citing *Allen v Michigan Bell Tel Co,* 18 Mich App 632, 637; 171 NW2d 689 (1987). Appellant had several realistic alternatives to entering into the fee agreement, the most obvious of which would be to hire another attorney. Appellant also could have opted to seek independent counsel regarding the fee agreement, as Appellee suggested.

As for substantive unconscionability, Appellant points to several provisions of the fee agreements and states that they are unconscionable, but fails to explain how. The Michigan Supreme Court has made it quite clear that:

> ***10** It is not enough for an appellant in his brief simply to announce a position or assert and [sic] error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959). Neither this Court, nor Appellee, should be required to speculate as to why such provisions are unconscionable.

There was no genuine issue of material fact as to the unconscionability of the fee agreements. Appellant never demonstrated any evidence of procedural unconscionability, and only baldly stated that certain provisions were substantively unconscionable. As such, the trial court did not err in refusing to find that the fee agreements were unconscionable.

Moreover, even if all of Appellant's allegations of unconscionability were true, the arbitration provision would not be invalidated. In order to invalidate the arbitration agreement, the alleged unconscionability must concern the agreement to arbitrate, and not other severable portions of the fee agreement. The US Supreme Court explained that "courts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope '[u]nless the [validity] challenge is to the arbitration clause itself". *Granite Rock Co. v Int'l Broth of Teamsters,* 2847 130 S.Ct. 2847, 2857; 177 L.Ed.2d 567 (2010) (internal citations omitted). Here, none of the "validity challenges" raised by Appellant concern the agreement to arbitrate. Appellant does not even allege that the agreement to arbitrate is unconscionable, but only that other aspects of the fee agreement are. Thus, even if Appellant's allegations of unconscionability were true, they would not invalidate the arbitration provision.

***11 C. The Trial Court Did Not Err in Refusing to Find that the Fee Agreements Were Procured by Fraud in the Inducement**

Appellant's allegations regarding fraud in the inducement barely warrant a response. After setting forth the elements of a claim of fraud in the inducement, Appellant fails entirely to explain how those elements are met. Appellant simply lists five alleged instances that she believes constituted fraud in the inducement, without so much as a sentence explaining how such instances satisfy any of the aforementioned elements of fraud.

Moreover, all of the alleged instances of fraud concern aspects of the fee agreements other than the arbitration provision. However, as explained supra, for the arbitration agreements themselves to be unenforceable, the fraud alleged must concern the agreement to arbitrate, and not other severable portions of the agreement. "[C]ourts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope '[u]nless the [validity] challenge is to the arbitration clause itself". Id. (internal citations omitted). Here, none of the "validity challenges" raised by Appellant go to the agreement to arbitrate. Instead, all of the alleged instances of fraud go to other portions of the fee agreements. Thus, even if Appellant's allegations of fraud in the inducement were true, they would not invalidate the arbitration provisions.

II. Appellant Relies on Inapplicable and Non-Binding Unpublished Opinions and Extra-Jurisdictional Case Law.

In Appellant's Brief, Appellant relies on several inapplicable cases that do not support Appellant's position, and are not binding on this Court. The following analysis demonstrates that the authority relied upon by Appellant is non-binding, does not support Appellant's position, and in any event, actually lends support to Appellee'S position.

***12 A. Barclae v Zarb is Clearly Inapplicable and Not Binding on this Court**

i. Zarb is Unpublished, Not Binding Law, and Did Not Involve an Arbitration Agreement.

First, Appellant relies on dicta in an unpublished opinion of the Michigan Court of Appeals, in *Barclae v Zarb*, unpublished per curiam opinion of the Michigan Court of Appeals, issued January 18, 2011 (Docket No. 289878) (attached as Exhibit 14). As this is an unpublished opinion, it is not binding law. In any event, *Zarb* does not support Appellant's position. Initially, it is important to note that **Zarb did not involve an arbitration provision.** Rather, Zarb involved a jury trial waiver contained in a purchase agreement and forbearance agreement.

ii. Zarb does not Support the Argument that Non-Parties May not Invoke an Arbitration Clause.

Nonetheless, Appellant relies on this case for the proposition that, because - as she claims - Appellee was not a party to the arbitration agreements, *Appellant* may not be bound by the same. *Zarb* simply does not support this argument. While *Zarb* does tangentially discuss extra-jurisdictional case law regarding arbitration provisions, even this dicta does not support Appellant's argument:

> Other courts that have addressed this issue have relied on authority regarding arbitration clauses and non-signatories. In these cases, an individual typically has signed a contract, which contained an arbitration clause, as an agent on behalf of a principal. When the individual is later involved in litigation related to the contract, courts have allowed the individual to ***avoid*** the arbitration clause reasoning ***that the individual did not intend to be bound in an individual capacity.*** Otherwise, the individual would have signed the contract twice, as both an agent and an individual. *See e.g., Bel-Ray Co. v. Chemrite Ltd.,* 181 F3d 435, 444-446 (CA 3, 1999), *Testerman v. Buck,* 667 A.2d 649, 651 (Md App, 1995).

Zarb, supra at 3-4 (emphasis added).

Zarb suggests, in dicta, only that a non-party to an arbitration agreement may not be bound by such agreement; in other words, you cannot force a non-party to an arbitration ***13** agreement to arbitrate his or her claims. Here, there is no dispute that Appellant was a party to the arbitration agreements, and as such, she is bound by the same.

In fact, *Zarb* actually explained that in other cases, the Michigan Court of Appeals has found that an agent who is not a party to an arbitration agreement individually, may nonetheless invoke an arbitration clause: "In other cases, courts have allowed the individual to invoke the arbitration clause, ***reasoning that the effect of an arbitration agreement would be nullified if a***

plaintiff could sue a defendant individually where the defendant only signed the arbitration agreement as an agent, not an individual." *Zarb, supra* at 4 (emphasis added), citing *Beaver v. Cosmetic Dermatology & Vein Ctr.*, unpublished per curiam opinion of the Michigan Court of Appeals, issued August 16, 2005 (Docket No. 253568)(attached as Exhibit 15), *Woodworth, Inc. v. Five Pointes Constr. Inc.*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 23, 1998 (Docket No. 202875)(attached as Exhibit 16).

The unpublished Michigan Court of Appeals decision in Beaver, supra, cited by the Zarb court, held that where a doctor was the sole shareholder of, and only doctor in, his professional service corporation, he was included in the arbitration provisions of the arbitration contract between his P.C. and the patient, despite the fact that he did not sign the agreement. The Beaver Court indicated that "the use of arbitration as an inexpensive and expeditious method for resolving disputes is strongly endorsed by the law and public policy, and this Court will generally uphold valid arbitration agreements... The burden in an arbitration claim falls upon the party challenging the arbitrability of a claim, and all doubts are to be resolved in favor of arbitration." *Beaver, supra* at 2. (internal citations omitted). The Beaver Court quoting from the 6th Circuit decision in *Arnold v Arnold Corp., infra*, went on to confirm that "if plaintiff could ***14** avoid the natural consequences of the agreement to arbitrate by naming a non signatory party as a defendant, the effect of the arbitration agreement would be nullified." *Id.*

In *Woodworth, supra*, which is also cited by the *Zarb* Court, the plaintiff argued that the trial court erred in allowing an individual, D'Agostino, to invoke the arbitration clause because he was not a party to his construction company Five Pointes' building agreement with plaintiff. The *Woodworth* court disagreed explaining that "Plaintiffs claims against D'Agostino are based on statements he allegedly made on behalf of Five Pointes. Under these circumstances, the effect of the arbitration agreement would effectively be nullified if plaintiff were permitted to pursue a separate claim against D'Agostino." *Woodworth, supra* at 3.

Even if one were to accept Appellant's tenuous argument that Appellee is not a party to the arbitration agreements individually, even though he signed them, Appellant should not be allowed to simply sue Appellee individually in order to circumvent the arbitration agreements. This potential for **abuse** recognized by the *Zarb, Beaver, Arnold,* and *Woodworth* courts is precisely what Appellant seeks to accomplish.

iii. Zarb Relies on the Specific Language of the Provisions in That Case

The Zarb court's decision not to apply the jury trial waiver in that case was grounded in the fact that the relevant provisions explicitly applied only to parties, and not their agents. The arbitration provisions in this case were not so drafted.

Appellant quotes and relies on an important excerpt from Zarb in her Brief in Support. This excerpt is restated below:

> To interpret these waivers to apply to Zarb, this Court would be required to rewrite the plain language of the clauses to not only apply to "each party," but also "agents of each party."

***15** *Zarb, supra* at 4-5. Appellant presents this excerpt as authority for the proposition that, because - as she contends - Appellee is not a party to the arbitration agreement, the arbitration provisions at issue in this case may not be invoked by Appellee.

However, Appellant conveniently fails to note that the provisions at issue in Zarb explicitly stated that they applied only to each party:
"EACH PARTY ... KNOWINGLY AND VOLUNTARILY, AND FOR THEIR MUTUAL BENEFIT WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO" the agreements, the notes, or other loan documents.

Zarb, supra (emphasis in original). The *Zarb* court indicated that it was because the provision at issue explicitly limited its application to parties, that it could not be invoked against an agent, individually.

Quite to the contrary, application of the arbitration provisions in this case would not require this Court to "rewrite the plain language of the clauses [.]" The fee agreements - in which the arbitration provisions were contained - did not explicitly limit their application to "each party" as the agreements in *Zarb* did. In fact, the fee agreements in this case clearly stated that "[a]ny controversy, dispute, or claim ***arising out of*** our [sic-or] relating to our fees, charges, ***performance of legal services***... shall be resolved through binding arbitration." Exhibits 1 and 2 (emphasis added). Further, the very same documents explicitly stated - in paragraph 4. entitled "***Who Will Perform the Services***" - that "the client agrees that work relating to this matter will be done by attorneys, legal assistants, law clerks, and/or secretaries employed by or associated with the Law Firm of RICHARD R. SCARFONE, P.C. in the sole and absolute discretion of RICHARD R. SCARFONE, P.C." Exhibits 1 and 2 (emphasis added). Thus, clearly, any dispute ***16** arising out of "legal services" provided by anyone listed in Section 4. would be subject to the arbitration provisions.

iv. Public Policy Regarding Arbitration Fatally Distinguishes Zarb From the Case at Bar

While noting that its decision supported the principle that "every reasonable presumption should be indulged against the waiver of a fundamental constitutional right such as a jury trial[,]" the *Zarb* court went on to recognize this presumption is the "key distinction" between jury trial waivers - which that case was concerned with - and arbitration clauses. ***"Whereas every reasonable presumption should be indulged against the waiver of a jury trial, any doubts about the arbitrability of an issue should be resolved in favor of arbitration."*** *Zarb, supra* at 5, citing *Rooyakker & Sitz, PLLC v Plante Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007).

Clearly, in light of this key distinction; the fact that *Zarb* did not involve an arbitration agreement; the different language in the provisions in *Zarb* as compared to those in this case; the fact that *Zarb* does not support the proposition that an agent - that is not a party to an agreement individually - may not ***invoke*** an agreement; and the fact that *Zarb* is a non-binding, unpublished decision; this case is entirely inapplicable and does not support Appellant's argument in any way.

B. Riley v Ennis is Fatally Distinguishable from This Case and from Arnold, supra.

Appellant contends that *Riley v Ennis*, unpublished per curiam opinion of the Michigan Court of Appeals, issued February 25, 2010 (Docket No. 290510) (attached as Exhibit 17), involved a "nearly identical issue." Appellant's Brief at 9. While *Riley* did involve an issue of whether an arbitration provision between employer and employee applied to an action against an ***17** agent of the employer, the language in the arbitration agreement in that case was different - in one very important respect - from the language in the arbitration agreements in this case, and in *Arnold, infra.* Just like in *Zarb, supra,* the language of the arbitration agreement in *Riley* explicitly limited its application to claims against a party, rather than those arising out of employment. In *Riley*, this Court explained that:

> Unlike the broad language in *Arnold* that was found to reflect a basic intent to provide for a single arbitral forum to resolve any disputes arising out of a stock purchase agreement, Appellant and the Ennis Center ***did not agree to arbitrate any dispute arising out of the employment relationship. The arbitration provision is confined to disputes with "the Agency,"*** which is defined as the Ennis Center.

Riley, supra, at 3 (emphasis added).

In this case, and in *Arnold, infra,* the arbitration provisions were not so confined. In this case, the arbitration provisions provided that: "Any controversy, dispute, or claim arising out of [or] relating to our fees, charges, performance of legal services...or other aspects of our representation shall be resolved through binding arbitration in Michigan in accordance with the rules of

the American Arbitration Association... Exhibits 1 and 2. Clearly, this provision does not limit arbitration to disputes with the Professional Corporation, but like *Arnold, infra,* includes all disputes "arising out of" the representation. Thus, the holding in Riley is not instructive in this case.

C. McCarthy v Azure is Non-Binding, Extra-Jurisdictional and Inapplicable

Appellant cites to a First Circuit decision, *McCarthy v Azure,* 22 F3d 351 (1st Cir 1994), for the proposition that Appellee may not invoke the arbitration agreements against Appellant. Like *Zarb, McCarthy* is not binding on this court. In any event, *McCarthy* does not support Appellant's position either.

***18** In *McCarthy,* the First Circuit found that the arbitration provision - signed by an agent, only in his official capacity - could not be invoked when that agent was sued in his individual capacity. The court found that case distinguishable from other cases, including the Sixth Circuit decision in *Arnold v Arnold Corp., infra,* which held that arbitration provisions could be invoked by agents or employees that are sued individually. However, the court came to this conclusion based on several significant facts.

First, the court stated that the language of the provision in that case "fail [ed] to indicate the corporate signatory's intention to protect employees through arbitration[.]" *McCarthy,* 22 F3d at 357. The arbitration agreements in this case, on the other hand, explicitly stated that disputes arising out of legal services would be arbitrated, and explained who would perform those services. Clearly, unlike in *McCarthy,* these agreements demonstrate an intent to protect the agents and employees of Richard R. Scarfone, P.C. through arbitration.

Second, the *McCarthy* court noted that the cases cited by the appellant in that case -which held that arbitration provisions could be invoked by agents or employees that are sued individually - were distinguishable because they "involve[d] disputes growing out of service contracts". *Id.* The court also recognized that "[t]he claims diverted to arbitration in those cases-and in other cases that appellant could have, but did not, rely upon... were, without exception, in the nature of professional malpractice." *Id.* On the other hand, the arbitration agreement in *McCarthy* was entered into in connection with a Purchase Agreement. *Id.* The court explained that "[t]he distinction is an important one", stating that:
A person who enters into a service contract with a firm contemplates an ongoing relationship in which the firm's promises only can be fulfilled by future (unspecified) acts of its employees or agents stretching well into an uncertain future. A person who contracts to transfer assets to a company faces a much different prospect: a one-shot transaction in which the purchaser's obligations are specified and are, essentially, performed in full at the closing, or ***19** soon thereafter. So it is here. And because the Purchase Agreement cannot easily be construed to refer to the operations of, or services rendered by, Theta II, that company's employees cannot plausibly be included by implication within the ambit of either the agreement or its arbitration clause.

Id.

Clearly, even under the rationale in *McCarthy,* the arbitration agreements in this case could be invoked by an agent or employee of Richard R. Scarfone, P.C.

However, insofar as this court is persuaded by decisions of the Federal Courts of Appeals, an analysis of the case law in our Sixth Circuit should be more persuasive. In *Arnold v Arnold Corp.,* 920 F2d 1269, 1281 (6th Cir 1990), the Sixth Circuit was faced with this issue, although applying Ohio law, and recognized that "if appellant can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." *Id.* at 1281 (internal quotations omitted), *see also Woodworth, Inc. v. Five Pointes Constr. Inc., supra* (attached as Exhibit 16) ("If plaintiff can avoid the practical consequences of the agreement to arbitrate by naming nonsignatory parties as a defendant, or signatory parties in their individual capacities only, the effect of the arbitration agreement would effectively be nullified.").

The *Arnold* court relied on the majority view, as stated in *Letizia v Prudential Bache Securities, Inc.*, 802 F2d 1185 (9th Cir 1986). In that case, "the court held that a broker's employees, who were nonsignatories to the brokerage agreement, were entitled to the agreement's arbitration clause in plaintiffs action against broker and employees for fraud and violation of federal securities laws." *Arnold*, 920 F2d at 1282, citing *Letizia*, 802 F2d at 1187. Thus, according to *Arnold*, *even individuals that did not sign the agreement* would be entitled to invoke the same. The court reasoned that non-signatory agents should be entitled to invoke the ***20** arbitration provisions because the acts giving rise to the lawsuit related to the individuals actions as agents or employees of the principal:

All of these alleged wrongful acts relate to the nonsignatory defendants' behavior as officers and directors or in their capacities as agents of the Arnold Corporation.

We believe that Arnold Corporation is entitled to have the entire dispute arbitrated, where, as here, the individual defendants and Carl Marks & Co. wish to submit to arbitration. We therefore will follow the well-settled principle affording agents the benefits of arbitration agreements made by their principal and affirm the district court's decision on this issue.

Arnold, 920 F2d at 1282.

Here, not only did Appellee sign the agreement, but like in *Arnold*, all of the acts giving rise to this action relate to Appellee's actions as an attorney and agent of Richard R. Scarfone, P.C. Thus, the reasoning in *Arnold* applies with equal force to the case at bar, and Appellant cannot avoid the consequences of the arbitration provisions by naming Appellee, a nonsignatory, as the defendant.

D. Appellant's Reliance on City of Detroit Police and Fire Retirement System v GSC CDO Fund, Ltd, is Entirely Misplaced.

Appellant states in her brief that *City of Detroit Police and Fire Retirement System v GSC CDO Fund, Ltd*, unpublished per curiam opinion of the Michigan Court of Appeals, issued May 11, 2010 (Docket No. 289185) [2] (attached as Exhibit 18), notes that "other jurisdictions have drawn a legal distinction between (a) binding non-signatories to arbitration agreements and (b) allowing non-signatories to compel arbitration." Appellant's Brief at 12. While that may be true, it is irrelevant, as *GSC CDO Fund, Ltd* involved the same situation as the case at bar, namely, an alleged nonsignatory attempting to enforce the arbitration clause against a signatory.

***21** Appellant relies on the opinions of Fifth Circuit, discussed in GSC CDO *Fund, Ltd*, which state that:

> a non-signatory to an arbitration agreement can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract.

Brown v Pacific Life Ins Co, 462 F3d 384, 389-90 (5th Cir 2006), citing *Grigson v Creative Artists Agency, LLC*, 210 F3d 524, 528 (5th Cir 2000). After citing this extra-jurisdictional rule, Appellant simply states, without any support or explanation, that Appellant does not need to rely on the terms of the written agreement to assert her claims, or raise allegations of substantially interdependent or concerted misconduct by both the individual Defendant and the corporation.

However, it is quite clear that, like in *GSC CDO Fund, Ltd*, Appellant's allegations involve substantially interdependent and concerted alleged misconduct by the signatory Richard R. Scarfone, PC, and the alleged nonsignatory, Richard R. Scarfone. It goes without saying that Richard R. Scarfone was the attorney that Appellant hired pursuant to the fee agreements with Richard

R. Scarfone, PC. In fact, it is hard to imagine a circumstance in which the two could be more interdependent. The actions of one are the actions of the other.

This Court reasoned in *GSC CDO Fund, Ltd,* that the allegations in the plaintiffs complaint involve "substantially interdependent and concerted misconduct by both the signator[ies] and one or more non-signatories to the contract", because, among other reasons, "Murray and Giampetroni [nonsignatory employees] were both employed by Smith Barney (a signatory to the agreement) when plaintiff alleges they breached their fiduciary duties...." *GSC CDO, Ltd, supra,* at 7. Likewise, Richard R. Scarfone (allegedly a nonsignatory) was employed by Richard R. Scarfone, PC (a signatory) when he allegedly committed acts of malpractice.

22** In any event, *GSC CDO, Ltd* actually held that ***"the plaintiff should be estopped from arguing that its claims against any nonsignatories to the arbitration agreement are not subject to arbitration." *Id.* (emphasis added). This Court explained that "[t]he underlying basis of all plaintiffs claims emanates from and goes back to its relationship with Smith Barney, a party to the consulting agreement that contains the arbitration agreement." *Id.* at 8. Much the same, all of Appellant's allegations in this case emanate from and go back to her relationship with Richard R. Scarfone, PC, a party to the fee agreements that contain the arbitration provisions. "Thus, Appellant's allegations are 'intimately founded in and intertwined with the obligations imposed by the [agreement containing the arbitration clause].'" *Id.,* quoting *MS Dealer Serv Corp v Franklin,* 177 F3d 942, 948 (11th Cir 1999) (quotation omitted).

CONCLUSION

Clearly, none of the cases cited by Appellant support her position, and in fact, all of these cases are consistent with, and actually support Appellee's position. Appellant provides absolutely no authority to support her contention that the arbitration agreements at issue are not binding on her. Moreover, Appellant has not even presented complete arguments regarding the alleged unconscionability or fraud, nor do these incomplete allegations even pertain to the unconscionability or fraudulent inducement of the arbitration clause itself. Because of this complete lack of authority, gross mischaracterization of law, and overall failure to present any legally defensible arguments, this Court should affirm the trial court's order.

*23 RELIEF REQUESTED

Appellee respectfully requests that this Court affirm the trial courts order granting summary disposition in favor of Appellee.

Footnotes

1 Appellant's argument in this regard apparently only applies to the second fee agreement.

2 Improperly cited by Appellant as Docket No 290501, which is Riley, supra.

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